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February 24, 1998

OFFICE OF THE  
EXECUTIVE SECRETARY

**HAND DELIVERED**

Mr. K. David Waddell  
Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243-0505

Re: AVR of Tennessee, L.P. d/b/a Hyperion Telecommunications of Tennessee  
Docket No. 98-00001

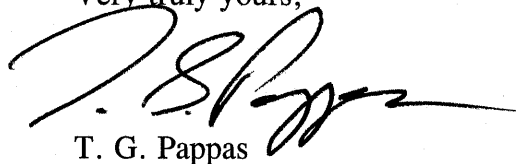
Dear Mr. Waddell:

As directed by the TRA at its Conference on February 3, 1998 enclosed please find an original and thirteen (13) copies of the Reply Brief of Tennessee Telephone Company, Concord Telephone Company, Tellico Telephone Company and Humpheys County Telephone Company in the above styled matter.

Copies of this letter and Reply Brief are being hand delivered or mailed to counsel of record.

Thanking you, with kindest regards, I remain

Very truly yours,



T. G. Pappas

TGP:vmd

cc: Val Sanford, Esq.  
Dennis McNamee, Esq.  
L. Vincent Williams, Esq.  
John Feehan

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**  
**NASHVILLE, TENNESSEE**

REC'D TN  
REGULATORY AUTH.  
'98 FEB 24 AM 11 24

**IN RE: AVR of Tennessee, L.P. d/b/a )  
Hyperion Telecommunications of )  
Tennessee, L.P., Application for a )  
Certificate of Public Convenience and )  
Necessity to Extend its Territorial Area )  
of Operations to Include the Areas )  
Currently Served by Tennessee )  
Telephone Company )**

OFFICE OF THE  
EXECUTIVE SECRETARY

**Docket No. 98-00001**

**REPLY BRIEF OF INTERVENORS TENNESSEE TELEPHONE COMPANY,  
CONCORD TELEPHONE COMPANY, TELlico TELEPHONE COMPANY,  
AND HUMPHREYS COUNTY TELEPHONE COMPANY**

**INTRODUCTION**

Intervenors file this Reply Brief, as ordered by the Tennessee Regulatory Authority ("TRA") at its Directors' Conference on February 3, 1998, on the legal issue of whether the TRA may grant a certificate of convenience and necessity to AVR of Tennessee, L.P., d/b/a Hyperion of Tennessee, L.P. ("Hyperion"), in the face of a state statute that clearly prohibits it. In their previously-filed Brief, Intervenors showed that the TRA must uphold the state statute, T.C.A. § 65-4-201(d), the terms of which Hyperion itself admits bars its Application. Nowhere in Hyperion's Brief is any authority cited that would empower the TRA to rule that the state statute is invalid and unenforceable because preempted by federal law. Accordingly, Intervenors respectfully submit that the Application must be denied.

## **SUMMARY OF INTERVENORS' POSITION**

No party to this proceeding contests that T.C.A. § 65-4-201(d) prohibits the TRA from granting Hyperion's Application for a certificate of convenience and necessity to serve an area served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this State, such as Tennessee Telephone Company. As a regulatory agency of the State, the TRA has the duty to insure enforcement of all laws, such as T.C.A. § 65-4-201(d), over which it has jurisdiction. See T.C.A. § 65-1-213. Hyperion asks the TRA to nullify state law and to rule that T.C.A. § 65-4-201(d) is preempted by federal law; however, a state agency, such as the TRA, does not have authority to declare a state statute invalid, either on constitutional or other legal grounds. Regardless of the actions of the Federal Communications Commission ("FCC") preempting provisions of some other state's law, the FCC's decisions in those cases did not deal with any provision of Tennessee law. The FCC itself cannot preempt a state law without giving notice and an opportunity for public comment, neither of which has occurred at this point with respect to T.C.A. § 65-4-201(d). See 47 U.S.C. § 253(d).

### **REPLY TO HYPERION'S ARGUMENTS**

#### **A. Hyperion's Assertions As To Various Facts Are Immaterial And Should Be Ignored.**

At several places in Hyperion's Brief, it makes factual assertions as to the quality of telecommunications services it provides in other localities, the potential benefits to consumers of its offering of its services, and its ability to provide telecommunications

services to certain types of customers. See Hyperion Brief at 1, 2 & 4. These statements are irrelevant and immaterial as there is neither a question of fact before the TRA in this proceeding at this time, nor has any factual record been developed. The only salient inquiry is a question of law: Does the TRA have the authority to strike down a state statute as being preempted by a section of federal law? Hyperion's assertion of facts of the character specified above should be ignored.

**B. Hyperion Cites No Authority For The TRA to Nullify State Law.**

Hyperion's Brief is nearly twenty pages long, and yet nowhere is there a citation to a single authority that would empower the TRA to declare T.C.A. § 65-4-201(d) invalid and unenforceable. Intervenor's prior Brief, however, sets forth ample authority to the effect that an administrative agency does not have such power. Moreover, Hyperion's argument that T.C.A. § 65-4-201(d) is preempted by federal law involves a facial attack on the constitutionality of the statute based on the Supremacy Clause of Article VI of the Constitution of the United States. See Hyperion Brief at 8-9. Accordingly, the TRA must be governed by the compelling authority of the Tennessee Supreme Court in Richardson v. Tennessee Board of Dentistry, 913 S.W.2d 446 (1995), which held that "[t]he facial constitutionality of a statute may not be determined by an administrative tribunal in an administrative proceeding." Id. at 454.

The TRA is without authority to strike down a state statute, and the actions of the FCC in cases addressing the laws of other states do not give it that authority. Thus, at this

stage of the proceedings, it does not matter that the United States Congress has provided the FCC with power to preempt state law under certain circumstances in 47 U.S.C. § 253(d). See Hyperion Brief at 9. Nor does it matter at this point whether Hyperion is accurate in its characterization of FCC decisions as consistently reaching a certain conclusion with respect to preemption. See Hyperion Brief at 10. It is not even relevant that the FCC has considered statutory provisions of two other states and found them preempted under 47 U.S.C. § 253(d).<sup>1</sup> See Hyperion Brief at 11. Those are arguments that should be addressed to the appropriate forum at the proper time, but they are not relevant to any determination by the TRA, which does not have authority to declare state law invalid or unconstitutional.

**C. The TRA Should Assure That Hyperion Does Not Obtain Interconnection With Tennessee Telephone Company Pursuant To 47 U.S.C. § 251(c).**

Intervenors' previous Brief explains why the TRA should not permit Hyperion to seek interconnection with Tennessee Telephone Company pursuant to 47 U.S.C. § 251(c), in the event the TRA should decide to grant Hyperion's Application. Intervenors were

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<sup>1</sup>Hyperion contends that the statutes of Wyoming and Texas that have been preempted by the FCC were less onerous than § 65-4-201(d), because they only provided an exemption from competition to incumbent local exchange telephone companies with 31,000 access lines, whereas T.C.A. § 65-4-201(d) granted the exemption to an incumbent local exchange telephone company with fewer than 100,000 access lines in the State. See Hyperion Brief at 16. However, it is not within the authority of the TRA to rule that the Tennessee General Assembly should have selected a different number of access lines for the threshold under which an incumbent local exchange telephone company could qualify for the exemption of T.C.A. § 65-4-201(d).

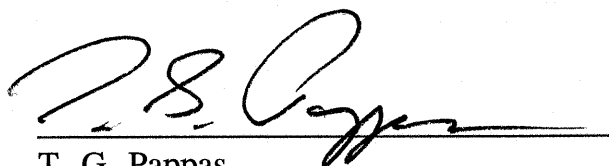
alerted to the need to make this request by a statement in Hyperion's Petition, at page 10, in which it asserted that it was not requesting interconnection pursuant to 47 U.S.C. § 251(c) "at this time." That assertion contradicted a letter to Tennessee Telephone Company dated October 13, 1997, in which Hyperion explicitly requested interconnection pursuant to that section.

At several points in its Brief, Hyperion repeats the assertion that it is not requesting the onerous requirements of interconnection pursuant to § 251(c), followed by the curious phrase "at this time." See Hyperion Brief at 2, 7 & 8. However, as discussed in Intervenor's previous Brief, based on the date of Hyperion's October 13, 1997 letter, the arbitration window on Hyperion's interconnection request would open on February 26, 1998, and close on March 24, 1998. This would give sufficient time for Hyperion to "change its mind" if the TRA grants its pending Application, and proceed to file an arbitration request coupled with a request to terminate Tennessee Telephone Company's rural exemption, all in an effort to obtain interconnection pursuant to § 251(c). Indeed, the March 24 deadline for Hyperion to arbitrate § 251(c) interconnection issues may explain why Hyperion refused to grant more than a seven-day extension of the time for the TRA to decide the legal issue currently before it. In any event, Hyperion should not be allowed to obtain the certificate it is seeking, based in part on representations that it does not request interconnection pursuant to 47 U.S.C. § 251(c), only to press for those interconnection duties immediately after obtaining a certificate.

### CONCLUSION

For all the foregoing reasons, as well as those set forth in their initial Brief, Intervenor respectfully request the TRA to deny the application of Hyperion.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by first class mail, postage prepaid, this 24th day of February, 1998, as follows:

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